IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 24TH SEPTEMBER 2007 / 2ND ASWINA 1929

SA.No. 52 of 1994()

(AS.91/1992 of SUB COURT.,THALASSERY AGAINST THE JUDGMENT IN OS.77/1988 DATED 21/12/1991 OF THE MUNSIFF COURT, KUTHUPARAMBA)

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APPELLANT: APPELLANT:PLANTIFF:

KATHIRAN MAKKAM,
W/O.KANARAN CHETTIAR,
RESIDING IN PATUVILAYI AMSOM,
VENGAD DESOM, VENGAD PANCHAYATH.

BY ADV. SRI.GRASHIOUS KURIAKOSE

RESPONDENTS: RESPONDENTS:DEFENDANTS:

***1. CHADAYAN DEVAKI, D/O.APPA,**
VENGAD DESM, PATUVILAYI AMSOM. (D I E D)

***IT IS RECORDED THAT THE 1ST RESPONDENT IS DIED AND DELETED FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANT VIDE ORDER DTD. 10/01/2007 IN MEMO BEARING C.F.NO.92/07.**

2. SON THAVARA VIJAYAN, VENGAD DESOM.
PATUVILAYI AMSOM.

3. BROTHER – THAVARA NARAYANAN,
VENGAD DESOM, PATUVILAYI AMSOM.

4. SISTER THAVARA RADHA,
VENGAD DESOM, PATUVILAYI AMSOM.

5. THAVARA CHANDRAN, VENGAD DESOM OF
PATUVILAYI AMSOM.

BY ADV. SMT.VIDHYA. A.C for R2 to R5

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 24/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

ORDER ON C.M.P.NO.70/1994 IN S.A.NO.52/1994

DISMISSED

24/09/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 52 OF 1994

Dated 24th September 2007

J U D G M E N T

Appellant is the plaintiff in O.S.77 of 1988 on the file of Munsiff court, Kuthuparamba. Respondents are defendants. Appellant instituted the suit seeking a decree for permanent prohibitory injunction. After the Commissioner submitted a report and plan, plaint was amended seeking decree for recovery of possession of plaint B schedule property. Plaint B schedule property was incorporated as part of plaint A schedule property. Original plaint schedule property was amended as plaint A schedule property. It is 28 cents in R.S.70/2. Plaint B schedule property is 2¼ cents in R.S.70/2. Case of appellant was that plaint schedule property originally belonged to appellant and her brothers and under Ext.A1 partition deed, properties were divided and a portion measuring $9^{1}/_{8}$ cents was allotted to appellant as item No.4 and 9½ cents was allotted to brother as item No.5 and another 9¼ cents was allotted to another brother as

item No.6 and under Exts.A2 and A3 assignment deeds she got assigned those two items also and thus appellant has title to plaint A schedule property having a total extent of 28 cents. Contending that respondents attempted to trespass into plaint schedule property suit was filed. When the report submitted by the Commissioner showed that a portion of that property is in the possession of respondents, plaint was amended seeking a decree for recovery of possession of that portion of the property which is shown as plaint B schedule property. Appellant contended that as she has title to that property she is entitled to recover possession of plaint B schedule property. Respondents in the written statement contended that appellant has no right or possession over any portion of R.S.70/1 and disputed property forms part of their property and appellant has no right or title to property and therefore suit is to be dismissed. After plaint was amended additional written statement was filed contending that appellant has no title to plaint B schedule property and it forms part of their property.

2. Learned Munsiff on the evidence of Pws.1 and 2, CW1, DW1, Exts.A1 to A5, B1 and B2 and C1 to C5

dismissed suit holding that disputed plaint B schedule property, which is shown as plot B in Ext.C4 plan prepared by the Commissioner, does not form part of the property belonging to appellant under Exts.A1 to A3 and therefore she has no title to the property. Appellant challenged the decree and judgment before Sub court, Thalassery in A.S.91 of 1992. Learned Sub Judge on re-appreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Second appeal was admitted formulating following the substantial questions of law.

> 1) Whether courts below were justified in preferring area to linear measurements of the property in question.
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> 2) Whether courts below were justified in granting a decree for recovery of possession without getting proper identification of the property.

4. Learned counsel appearing for appellant and respondents were heard. Argument of learned counsel is that commissioner did not property identify the property and the disputed plot B marked in Ext.C4 plan, does not

form part of the property of respondents but form part of the property of appellant obtained under Exts.A1 to A3 and property should have been identified with reference to the measurements given under Exts.A1 to A3 and not on the basis of survey number and therefore the decree and judgment passed by courts below are to be set aside. Learned counsel argued that even though appellant filed an application to get proper identification of the property by remitting the report to the Commissioner, it was dismissed by the trial court and first appellate court should have remanded the suit for proper identification. Learned counsel appearing for respondents argued that appellant accepted the correctness of Ext.C4 plan and got the plaint amended showing plaint B schedule property as shown by the Commissioner in Ext.C4 plan and in such circumstances, correctness of identification cannot be disputed. It was also argued that when the Commissioner was examined, there was no serious challenge with regard to identification and as per the evidence the disputed plaint B schedule property forms part of R.S.70/1 and not R.S.70/2 and when appellant has no case that she has any right in respect of any portion of the property in

R.S.70/1 appellant is not entitled to a decree sought for and in any case substantial question of law formulated is not involved.

5. Though suit was originally one for injunction after amendment, suit is for recovery of possession of plaint B schedule property on the strength of title. When suit is for recovery of possession on the strength of title, appellant can succeed only on establishing his title to the plaint B schedule property. For that purpose appellant has to identity plaint B schedule property as part of the property obtained by appellant under Exts.A1 to A3. Commissioner has originally filed Exts.C1 report and C2 plan. Ext.C1 report with the evidence of Commissioner as CW1 establish that when Commissioner inspected the property respondents did not co-operate with the Commissioner. It is in such circumstances, Ext.C2 plan was prepared. In Ext.C2 plan Commissioner has separately shown the disputed plot as plot B and the demarcating boundary which separates the disputed property from the remaining property of appellant in blue coloured line. Report and plan were remitted back to the Commissioner at the instance of appellant. Ext.C3 report and C4 plan with the evidence

of Commissioner as CW4 establish that Commissioner inspected the property once again along with surveyor and field measurement book was also available to the Commissioner. Ext.C3 report establish that it is with the help of the surveyor and field measurement book, properties were identified and Commissioner found that blue line shown in Ext.C2 plan exactly tallies with the survey boundary line which separates R.S.70/1 and 70/2. It is on that basis Commissioner reported that disputed plot B forms part of R.S.70/1 and remaining property of appellant is in R.S.70/2. It was thereafter appellant amended the plaint in accordance with Ext.C4 plan. Even though plaint B schedule property was incorporated showing the extent as marked by the Commissioner, appellant did not raise a contention that identification is not correct or plaint B schedule property is not part of R.S.70/1 as shown by the Commissioner. Instead plaint B schedule property is shown as part of R.S.70/1.

6. Appellant can succeed in the suit only on establishing that plaint B schedule property forms part of the property covered under Exts.A1 to A3. Exts.A2 and A3 are assignment deeds whereunder other sharers to whom plots 5 and 6 were allotted under Ext.A5, were purchased

by appellant. It was under Ext.A1, properties were divided. Properties divided under Ext.A1 is the property which was obtained by the family as per registered assignment deed 1118/1931. Appellant did not produce the anterior title deed, to prove the title. What could be divided under Ext.A1 partition deed is only the property obtained by the predecessor in interest of appellant as per 1931 document. If the appellant had produced the document and identified plaint B schedule property belongs to them as part of the property covered under Exts.A1 and A2 case could have been accepted. From the available evidence trial court and first appellate court found that plaint B schedule property is not part of the property covered under Exts.A1 and A2. That factual finding cannot be interfered by re-appreciating the evidence.

7. Though learned counsel appearing for appellant argued that Commissioner did not properly identify the plaint schedule property, when Commissioner was examined as CW1 he was not seriously cross examined with regard to correctness of identification. In such circumstances it is futile for the appellant to contend at this stage that identification of the property was not correct. As

evidence establish that the disputed plaint B schedule property does not form part of the property of appellant, she is not entitled to get recovery of possession sought for. Courts below rightly dismissed the suit. There is no merit in the appeal. Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.52 OF 1994

24th September 2007

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